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No. 05-1608

# In The Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

*Petitioners,*

v.

A-BEST PRODUCTS COMPANY, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia**

## RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the federal Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, preempt state-by-state regulation, including by the common law, of the design, construction and materials of the locomotive, its parts and appurtenances?

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation (GM) states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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## DISPUTED JURISDICTION

The Court lacks jurisdiction because the decision below is not final under 28 U.S.C. § 1257(a). It does not conclude the litigation as to all parties or all causes of action.

Petitioners sued dozens of defendants. The trial court granted summary judgment only as to three – respondents GM, Viad and Old Orchard. The causes of action on which respondents were sued, such as negligence and strict products liability, remain pending against other defendants. *See* p. 3 below. Thus the judgment is not "final" under § 1257(a) because it is not final "as to all the parties" and "as to all the causes of action involved." *Arnold v. United States*, 263 U.S. 427, 434 (1923). *See, e.g., Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892) (state-court judgment not final because case had been determined as to "only a portion of the defendants"); *Hohorst v. Hamburg-American Packet Co.*, 148 U.S. 262, 264 (1893) ("the suit is still pending and undetermined as against the codefendants," so "this appeal cannot be maintained, because the decree . . . was not a final decree"); Robert L. Stern, et al., *Supreme Court Practice* 144 (8th ed. 2002) ("[W]here there are a number of defendants to the same cause of action, the record must show that the judgment concludes the controversy as to all of them.").[1]

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[1] No exception to the finality requirement, *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), applies. The first, third and fourth exceptions are inapplicable on their face. The second applies only when the federal issue will "survive and require decision regardless of the outcome of future state court proceedings" and the further proceedings "'[can] not remotely give rise to a federal question . . . that may later come here.'" *See Florida v. Thomas*, 532 U.S. 774, 778-79 (2001) (quoting *Cox*, 420 U.S. at 480). That is not this case. The trial against remaining defendants may moot preemption, either by defeating petitioners' claims on other grounds (such as failure to prove asbestos-caused disease) or by providing petitioners complete relief (if they recover damages from other defendants). In addition, the future

(Continued on following page)

The Court accordingly lacks jurisdiction and should deny certiorari.

## TEXT OF PROVISIONS INVOLVED

In addition to the portions of the Locomotive Inspection Act quoted by petitioners (Pet. App. C), Article VI, clause 2 of the United States Constitution is involved. It provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

## STATEMENT OF THE CASE

GM formerly manufactured railroad locomotives. Some GM locomotives contained asbestos materials on some parts. *See Scheiding v. General Motors Corp.*, 77 Cal. Rptr. 2d 339, 340 n.1 (Cal. App. 1998) (potentially asbestos-containing locomotive parts are: steam generator insulation, exhaust stack insulation, insulating tape, motor insulation, pipe sleeves, gaskets, certain brakeshoes), *aff'd*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000).

Petitioners are "current and former railroad employees." Petition for Writ of Certiorari (Pet.) 1. They variously claim to have been exposed on their railroad jobs to asbestos

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proceedings could easily give rise to further federal questions. Other defendants, including makers of locomotive parts, likely have unadjudicated preemption defenses under the Safety Appliance Acts, 49 U.S.C. § 20301 *et seq.* or the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.* The West Virginia Supreme Court did not resolve the scope of preemption under these Acts and the defenses remain outstanding. *See In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003). Further, there is a very real chance that future proceedings will give rise to further federal questions, because petitioners' claims arise out of employment on railroads, an area "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982).

materials from as many as 60 defendants (not necessarily from GM's locomotives).

Petitioners' complaints proceed on various state law theories, including common-law negligence and products liability under the Restatement of Torts. For example, lead petitioner Ronald Lee Abbott's complaint alleges that defendants, including GM, were "generally negligent in failing to provide a safe product" through conduct such as "carelessly and negligently mining, milling, manufacturing, fabricating, supplying and/or selling the said asbestos and/or asbestos containing products" and "failing to use substitute materials for the asbestos and the asbestos-containing products." (Complaint, *Ronald Lee Abbott v. A-Best Products et al.*, Marshall County, W. Va. No. 00-C-43M ¶ 3608) He also alleges that defendants "are strictly liable . . . under the Restatement of Torts (Second) 402(A)" for, *inter alia,* selling "products which were in a defective condition and unreasonably dangerous." *Id.* ¶ 3611.

Petitioners allege that asbestos materials caused them to contract asbestos-related illnesses, suffer emotional distress, or sustain other damages. All of these alleged damages allegedly result from asbestos materials, the design that called for them, and the construction that used them.

Certain defendants initially moved for summary judgment on several grounds, including preemption by the Locomotive Inspection Act (LIA),[2] 49 U.S.C. §§ 20701-20903. The trial court denied the motion but certified three issues, including LIA preemption, to the West Virginia Supreme Court of Appeals. Agreeing with an "overwhelming body of case law," a veritable "avalanche," the state supreme court held that LIA preempted state

[2] LIA is also variously known as the Locomotive Boiler Inspection Act (LBIA), Boiler Inspection Act (BIA), or Federal Locomotive Inspection Act (FLIA).

tort claims. *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003).[3] The court pointed out that its holding did not leave petitioners without a remedy. As former railroad workers, they "have a remedy against the railroads under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.*" 592 S.E.2d at 822 n.2.

Respondents GM, Viad and Old Orchard then moved for summary judgment based on LIA preemption. The trial court, bound by the state supreme court's decision, granted the motions. Pet. App. A. Petitioners sought leave to appeal to the state supreme court, which was denied. Pet. App. B. Petitioners then filed their petition for writ of certiorari.

## SUMMARY OF ARGUMENT

The Court lacks jurisdiction because the decision below leaves the case pending as to other parties. Thus there is no final decision under 28 U.S.C. § 1257(a).

There is no issue warranting review anyway. It is settled that LIA occupies the field that is "within the scope of the authority delegated to" the Secretary of Transportation under LIA – including "the design, the construction and the material of every part of the locomotive and of all appurtenances." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926). Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable.

Petitioners' state-law claims attack the locomotive "design" that called for asbestos, the "construction" that

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[3] GM was not a party to the interlocutory West Virginia Supreme Court proceeding.

used it and the asbestos "materials" themselves. They indisputably fall within the Secretary's authority, and petitioners do not claim otherwise. Indeed, the Secretary has specifically regulated the asbestos-containing locomotive parts and addressed asbestos itself, underlining that these matters fall within his authority. Hence petitioners' claims fall squarely within the preempted field, and so, the West Virginia courts properly held, are preempted under *Napier*.

Petitioners do not challenge *Napier* or the long line of cases following it. Instead, they try to change the standard for preemption of tort claims from field preemption to conflict preemption. But *Napier* holds that LIA occupies the field, and its field fully embraces state tort law respecting locomotive design, construction and material, as every federal court of appeals or state court of last resort to address the issue holds. Seeking a way around that mountain of authority, petitioners argue that they might have a claim based on violation of LIA itself. But this argument was not properly presented in the West Virginia courts, which declined to address it. It is moreover incorrect. Nothing in LIA bars asbestos. The Secretary *declined* to bar asbestos.

Petitioners also protest that their state law claims are against manufacturers, and that LIA does not expressly apply to manufacturers. But it expressly does. LIA and its regulations speak to "manufacturer[s] . . . of railroad equipment." It also would not matter if they did not. Petitioners' claims are based on design and materials within the Secretary's authority, and so remain preempted whether the claim is made against the railroad who buys the locomotive or the manufacturer who builds and sells it. Indeed, permitting states to require manufacturers to comply with varying state rules regarding locomotive parts and warnings would yield exactly the patchwork of conflicting state rules regarding them that LIA and *Napier*

are meant to foreclose. Every federal court of appeals or state court of last resort to reach the issue agrees.

Still trying to find a way around the uniform case law holding their claims preempted, petitioners next advise that LIA applies only when the locomotive is "in use." No court has adopted that argument and it is wrong. LIA continues to apply when the locomotive is off-line. Petitioners' argument is, moreover, physically impossible. The locomotive's design is the same whether in use or off-line. Federal law cannot exclusively regulate the locomotive's design, construction and material on-line but allow state law to control them off-line.

Nor is there any reason for this Court to visit these questions. The federal courts of appeals and state supreme courts unanimously hold that LIA preempts state tort law, including claims against manufacturers, including claims based on use of asbestos.

In sum, petitioners do not challenge *Napier*, and identify no on-point appellate case that quarrels with *Napier*'s application on the facts here. No court – none – has reached a holding that would allow petitioners' claims. There is nothing to review.

## REASONS FOR DENYING THE PETITION

### I. LIA PREEMPTS PETITIONERS' CLAIMS UNDER SETTLED LAW.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where (1) the state law conflicts with federal law; (2) the federal law occupies a field, and the state law falls within that field; or (3) federal law expressly preempts the state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

It is settled that LIA occupies the field as to matters within the authority it confers on the Secretary. Petitioners' claims fall within that field. Therefore, they are preempted. When Congress occupies the field, "the States must leave all regulatory activity in that area to the Federal Government." *See Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

### A. The Settled Rule: LIA Preempts State Law On All Matters Within The Secretary's Authority Under LIA.

For 80 years, since Justice Brandeis' opinion for the Court in *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926), it has been settled that Congress intended LIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce.

*Napier* held that Congress intended LIA "to occupy the field" in respect to all areas subject to LIA, and that LIA accordingly preempted all state law within LIA's grant of authority to federal regulators – the Interstate Commerce Commission and now its successor, the Secretary of Transportation, via the Federal Railroad Administration (FRA).[4] *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction and the material of every part." *Id.* at 608, 611. The Court held that LIA conferred on the Commission "general" power to

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[4] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

regulate locomotive safety equipment, 272 U.S. at 611-12, and LIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further held that the state laws at issue fell "within the scope of the authority delegated to the Commission" by LIA, *id.* at 611, and so were preempted regardless whether they conflicted with a federal rule, or whether there were any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

*Id.* at 613 (emphasis added).

Petitioners do not question *Napier* and it remains settled law.[5] *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (*Napier* holds that LIA

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[5] The 1970 Federal Railroad Safety Act not alter BIA's preemptive effect. *Marshall*, 720 F.2d at 1152-53 (Kennedy., J.) (FRSA purposely left BIA "intact, including its preemptive effect"); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997); *Scheiding v. General Motors Corp.*, 993 P.2d 996, 1000 (Cal. 2000). In enacting FRSA, Congress explicitly said it intended to retain LIA, including precedents interpreting it such as *Napier*, without change. P. 11 below.

occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same); *Consol. Rail Corp. v. Pa. Pub. Util. Comm.*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 654 (E.D. Pa.) (LIA "totally preempts the field of locomotive equipment.").[6] *See also United Transp. Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000) (LIA preempted state locomotive-equipment regulation); pp. 13-15 below (citing numerous additional cases).

There are at least three reasons for this settled rule. First, locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pa. R.R. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

*Law v. General Motors Corp.*, 114 F.3d 908, 910-11 (9th Cir. 1997) (citations omitted); *accord Scheiding v. General*

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[6] This Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

*Motors*, 993 P.2d 996, 999 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 176 (Ala. 2002).

Second, Congress judged that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. Accordingly, "the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission," now FRA. *Baltimore & Ohio R.R.*, 293 U.S. 454 at 461. FRA "prescribe[s] the rules and regulations by which fitness for service shall be determined. . . . Thus the Commission [now FRA] sets the standard." *Napier*, 272 U.S. at 612. This unitary, expert regulation remains "essential," as the FRA explains:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations. . . . [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination, 43 Fed. Reg. 10,583, 10,585-86 (1978). "[T]he design of locomotives" is thus subject exclusively to FRA regulation, to the exclusion even of other federal agencies. *Id.* at 10587.

Third, Congress provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive,

and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *S. Ry. v. Lunsford,* 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated.

Besides being settled law, *Napier*'s preemption of all matters within federal authority under LIA embodies Congress' expressed intent. Enacting the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, in 1970, Congress reaffirmed that under LIA (and five other laws), "where the Federal Government has authority, with respect to rail safety, it preempts the field"; Congress specifically stated that these laws "have served well" and "chose to continue [them] without change." H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105, 4108. In 1994, Congress recodified LIA and various other transportation laws without substantive change, expressly preserving "the precedent value of earlier judicial decisions," such as *Napier.* Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994); H.R. Rep. No. 103-180, at 3, 5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822. This express statement confirms the normal presumption that in reenacting the statute, Congress "was aware of . . . earlier judicial interpretations and, in effect, adopted them." *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993). *See also Scheiding,* 999 P.2d at 1000; *Consol. Rail,* 536 F. Supp. at 655-57.

### B. The Settled Rule Preempts Petitioners' Claims.

Petitioners, railroad workers, claim that asbestos materials in GM's locomotives and locomotive parts (plus

numerous other defendants' asbestos) caused them to contract asbestos-related diseases, and, proceeding on various state law tort theories such as strict liability, claim that the locomotives and their parts were defective in design because they contained asbestos. The West Virginia Supreme Court of Appeals held such claims preempted. *West Virginia Asbestos Litig.*, 592 S.E.2d 818. Its analysis applied *Napier* according to its terms, is absolutely right, and accords with every federal court of appeals or state supreme court decision to address the issue.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances." *Napier*, 272 U.S. at 611. The asbestos-containing components whose design petitioners challenge – insulation, steam generators, exhaust stacks, motors, and others – are locomotive "parts" and "appurtenances." Therefore, their design and materials are within the Secretary's authority and the preempted field. Indeed, the Secretary has issued and considered regulations respecting them, under authority of LIA, underscoring that they are within the Secretary's authority. Federal regulations under LIA govern, *inter alia*, insulation (49 C.F.R. §§ 229.25(b) (2006), 229.89, 229.41, 229.83), motors (49 C.F.R. § 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab itself. (49 C.F.R. §§ 229.115-139). Asbestos in those components is accordingly within the Secretary's authority too.

Indeed, in 1996 the Secretary of Transportation, through FRA, considered asbestos regulation – confirming the Secretary's authority over locomotive asbestos – and decided to take no regulatory action. FRA acknowledged that asbestos was used on older locomotives, and may remain on some locomotives. FRA judged that it posed no health problem and that further regulation of asbestos in locomotives was unwarranted, for very good reasons:

> " . . . FRA has not identified sources of friable asbestos to which crew members could be exposed."
>
> "Asbestos remaining in older [locomotives] is believed to be encapsulated in individual components or systems. FRA could find no evidence of asbestos being a health problem for crews of older locomotives."
>
> "While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment."
>
> "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time" and "recommends no action be taken on the issue of asbestos in locomotives."

Federal Railroad Administration, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* at 10-1, 10-12, 12-9 (1996); *see Scheiding*, 993 P.2d at 999 n.2 (citing FRA report).[7]

Since petitioners' claims attack locomotive parts' design and materials, matters explicitly within the scope of the Secretary's authority, the claims fall within the field and are preempted.

Every federal court of appeals or state court of last resort to address the issue agrees. All hold that LIA preempts tort law respecting design, construction or material of locomotives – including claims against manufacturers, including asbestos claims identical to petitioners'. *See Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio

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[7] Asbestos is not unregulated, however. The federal Occupational Safety and Health Administration, with FRA's agreement, limits workers' exposure to asbestos. *Locomotive Crashworthiness and Cab Working Conditions* at 10-11.

2004) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts), *cert. denied*, 543 U.S. 1146 (2005); *Kilgore*, 853 So. 2d 171 (Ala. 2002) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts); *Scheiding*, 993 P.2d at 999 (Cal. 2000) (LIA preempts tort claims against manufacturers respecting use of asbestos in locomotive parts); *In re West Va. Asbestos Litig.*, 592 S.E.2d 818 (same); *see also Law*, 114 F.3d 908 (9th Cir. 1997) (LIA preempts failure-to-warn and design-defect liability, because warnings and designs are "within the scope of the Secretary's authority"); *Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205, 1209 (9th Cir. 2001) (LIA preempts design-defect claim respecting locomotive); *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (LIA preempts design-defect claims respecting warning devices on locomotives because they fall "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Del. & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts tort action claiming that locomotive seat should be designed differently and accompanied by warning), *cert. denied*, 528 U.S. 1004 (1999); *Marshall*, 720 F.2d at 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Mickleson v. Mont. Rail Link, Inc.*, 999 P.2d 985, 997 (Mont. 2000) (LIA preempts common-law action claiming that locomotive should be more conspicuous); *see also Norfolk S. Ry. Co. v. Denson*, 774 So. 2d 549, 555-57 (Ala. 2000) (LIA precludes judicial decision requiring air conditioners in locomotives). A wealth of

federal district court and state intermediate appellate cases agrees.[8] In all, at least 25 cases so hold.

Far from creating any conflict, the West Virginia courts joined this "avalanche" of case law. 592 S.E.2d at 822.

## II. THE DECISION BELOW DOES NOT WARRANT CERTIORARI.

Petitioners stretch to conjure a conflict and to poke holes in LIA's field, but the arguments are tortured, and ultimately reveal a misunderstanding of preemption.

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[8] *See Seaman v. A.P. Green Indust., Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (locomotive-asbestos claim preempted); *Eldridge v. Mo. Pac. R.R. Co.*, 832 F. Supp. 328, 330 (E.D. Okla. 1993) (negligence and strict liability design defect laws for failure to install warning devices on locomotives preempted); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D.Ala.1999) (LIA preempts passenger and employee common-law negligence and design-defect claims); *Roth v. I & M Rail Link, LLC*, 179 F. Supp. 2d 1054 (S.D.Iowa 2001) (LIA preempts state common-law tort claims against manufacturer of locomotive cab); *Bell v. Ill. Central R.R.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001); *Green v. River Terminal Ry. Co.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); *Smith v. Norfolk & W. Ry. Co.*, 776 F. Supp. 1335, 1342-43 (N.D.Ind.1991); *Carter v. Consolidated Rail Corp.*, 709 N.E.2d 1235, 1239 (Ohio App. 1998), *app. denied*, 694 N.E.2d 75 (Ohio 1998); *Furlough v. Union Pac. R.R. Co.*, 766 So. 2d 751, 761 (La. App. 2000); *Dillon v. Chicago Southshore & S. Bend R.R. Co. (In re Train Collision)*, 670 N.E.2d 902, 908-11 (Ind. Ct. App. 1996), *transfer denied*, 683 N.E.2d 591 (Ind. 1997), *cert. denied*, 522 U.S. 914 (1997); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511, 513 (Ga. App. 1997); *Cent. of Ga. R.R. v. Markert*, 410 S.E.2d 437, 438 (Ga. App. 1991). The lower courts so hold down to today. *See Union Pacific R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232, 235 (Wis. App. 2006) (tort claim preempted; under *Napier*, "federal law preempts all state claims, leaving no area within which states may act").

### A. Petitioners Did Not Properly Present And Do Not Have A Tort Claim For Supposed Violation Of LIA.

Petitioners first claim that the West Virginia decision conflicts with cases allowing state law to provide remedies for violation of the federal Safety Appliance Act, such as *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934), *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), and *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 (1916). Pet. 4-6. They later claim it conflicts with a Minnesota decision holding that Minnesota law could provide a remedy for violation of LIA. *See* Pet. 19 (citing *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 571 (Minn. 2002)). Apparently their idea is that asbestos could violate LIA itself, and that a tort claim premised on such a violation would not be preempted. Pet. 8, 19. There is nothing to review.

To begin, petitioners do not show that their theory was properly raised or passed on below, *see* Supreme Court Rule 14.1(g)(i), and it was not. Petitioners' complaints did not allege a LIA violation. They alleged only *state*-law theories such as negligence and strict products liability. P. 3 above. Accordingly, counsel for respondents pointed out in both the West Virginia Supreme Court and the trial court that no alleged violation of LIA or SAA was properly raised. (Reply Brief of Appellant Old Orchard Industrial Corp. on the Certified Questions, at 19; Transcript of Hearing in Circuit Court, May 2, 2002, at 46-47) Similarly, in response to respondents' summary judgment motions, petitioners provided no evidence of a LIA violation, let alone one that caused their injuries. Nor did they ever explain what LIA provision or regulation was supposedly violated by asbestos.[9] Consequently, neither the trial court

[9] Petitioners merely claimed they could recover "[i]f the plaintiffs in this case can demonstrate that the defendants['] products were

(Continued on following page)

nor the West Virginia Supreme Court addressed the argument. *See* Pet. App. A, B; *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818.

Thus there is no properly-presented issue to review. "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987) (quotations omitted). Moreover, petitioners' failure to provide evidence or reasoned argument that respondents violated LIA is an adequate and independent state-law ground for the West Virginia courts' decision to disregard the contention. *See Adams v. Robertson*, 520 U.S. 83, 87-88 (1997) (failure to raise issue properly in state court may be viewed as adequate and independent state-law ground to disregard argument). Nor is there any developed record on the contention.

But passing petitioners' failure to preserve the argument, there is nothing to it. Every court of last resort to address the issue holds that LIA preempts asbestos claims. *Darby*, 811 N.E.2d 1117; *Kilgore*, 853 So. 2d 171; *Scheiding*, 993 P.2d 996; *West Va. Asbestos Litig.*, 592 S.E.2d 818; *see* pp. 13-15 above. Petitioners cannot point to any LIA provision or regulation violated by asbestos,

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violations of the LBIA or the SAA." (Plaintiffs' Omnibus Response to Various Defendants' Motions for Summary Judgment Based on Federal Preemption at 25) As a matter of West Virginia law, speculation that they might be able to prove a violation was not enough to avoid summary judgment. *See Marchus v. Holley*, 618 S.E.2d 517, 525 (W. Va. 2005) (party "cannot create a genuine issue of material fact through mere speculation" but "must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor") (quotations omitted); W. Va. R. Civ. Proc. 56(e) (party cannot rest on allegations but must provide evidence).

because there is none. There is none because FRA judged none was warranted, finding "no evidence that the presence of asbestos [in locomotives] poses a problem to humans or the environment." *Locomotive Crashworthiness* at 10-12; pp. 12-13 above. FRA "prescribe[s] the rules and regulations by which fitness for service shall be determined" and "sets the standard," *Napier*, 272 U.S. at 612, and its decision is conclusive under petitioners' own case. *See Engvall*, 632 N.W.2d at 567 ("when the FRA has found a particular design of a part or appurtenance to be safe . . . a jury cannot find otherwise").[10]

Again, however, this discussion is beside the point. Petitioners' claims were brought under state negligence and products liability law, not LIA. Pp. 3, 16 above. Every federal court of appeals and state supreme court to reach the issue holds such claims preempted.

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[10] Because petitioners could not recover under *Engvall*, there is no occasion to review it. We note, however, that it is an outlier to the extent it allows a state-law claim based on alleged LIA violation. Published decisions elsewhere have only rejected, never followed, it on this point. *See Roth v. I & M Rail Link, LLC*, 179 F. Supp. 2d 1054 (S.D.Iowa 2001) (rejecting *Engvall*); *Bonner v. Union Pac. R.R.*, 2005 WL 1593635, *9 (D. Idaho 2005) (rejecting *Engvall*); *Mehl v. Canadian Pac. Ry.*, 417 F. Supp. 2d 1104, 1115 (D.N.D. 2006) (rejecting *Engvall*); *Union Pac. R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232, 237-38 (Wis. App. 2006) (rejecting *Engvall*); *see also Denson*, 774 So. 2d at 555-58 (Ala. 2000) (to maintain FRA's exclusivity, court could not impose duties under federal law beyond FRA equipment regulations); *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 299 (S.C. 2005) (same; state law could not impose new duties under guise of borrowing LIA standard). These decisions are certainly correct; FRA judges it is "essential" that a "single agency" regulate safety and "piecemeal regulation" by others "would be disruptive and contrary to the public interest." *See* 43 Fed. Reg. at 10,585-86; p. 10 above. And, no LIA-borrowing tort claim is needed because railroad employees like petitioners already have FELA claims (borrowing LIA if necessary) against their railroads. *See* 45 U.S.C. § 51 (FELA); *In re West Virginia Asbestos Litig.*, 592 S.E.2d at 822 n.2; pp. 10-11 above. Certiorari is not warranted to correct *Engvall*'s isolated mistake; the lower courts are rejecting it on their own.

### B. The Lower Courts Agree That LIA Preempts State Tort Law.

Petitioners next argue that their claims, although within the field Congress preempted, should nevertheless go forward because they are brought under state tort law. Pet. 6-7. There is no lower-court conflict here either. Every federal court of appeals or state supreme court to reach the issue holds that LIA preempts tort claims in its field. *E.g., Law,* 114 F.3d 908; *Oglesby,* 180 F.3d 458; *Scheiding,* 993 P.2d 996; *Mickelson,* 999 P.2d 985; pp. 13-15 above. None allows a claim to go forward on petitioners' theory.

Still, petitioners argue, tort claims should be preempted only if they "conflict" with LIA or exert a "direct and substantial effect" on the federal regulatory scheme. Pet. 6-7. LIA, however, occupies the field. *Napier,* 272 U.S. at 613. As petitioners' own cases demonstrate, Congress' relevant "intent" in occupying the field is "to exclude state regulation" from the field, so *any* state law in the field necessarily "conflicts with" that intent and is preempted. *English v. Gen. Elec. Co.,* 496 U.S. 72, 79-80 n.5 (1990); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted."). Thus, whether state tort law conflicts with federal rules, or whether there are any federal rules at all, remains "without legal significance." *Napier,* 272 U.S. at 613.

It has, moreover, been settled for over 40 years that tort claims are designed to affect conduct, regulate just as statutes and regulations do, and are accordingly preempted as statutes and regulations are:

> ***[R]egulation can be as effectively exerted through an award of damages*** as through some form of preventive relief. The ***obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.*** Even the ***States' salutary effort to redress private***

> ***wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.***

*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) (emphasis added). Thus this Court has repeatedly applied ordinary preemption principles to common-law damage actions. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867-74 (2000) (products-liability claim was preempted; "ordinary pre-emption principles" applied); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (common-law claim for personal injuries was preempted; "ordinary" preemption principles applied); *Cipollone*, 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so failure to warn claims alleging personal injury were preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-97 (1987) (common-law nuisance claims preempted); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (Federal Railroad Safety Act "pre-empts respondent's state tort claim").

The federal circuits and state supreme courts are simply following the *Garmon* principle according to its terms. *E.g.*, *Scheiding*, 996 P.3d at 1003 (asbestos claim preempted; U.S. Supreme Court "has long rebuffed efforts to draw this artificial distinction" between common and statutory law; quoting *Garmon*); *Kilgore*, 853 So. 2d at 179 (quoting *Garmon*); *Darby*, 811 N.E.2d at 1125; *see also Law*, 114 F.3d at 910 (quoting *Garmon*); *Oglesby*, 180 F.3d at 462 ("For a locomotive carrier or manufacturer, the source of the damages, whether statutory or common law, is irrelevant, and both must therefore be preempted by the BIA.").

Petitioners never discuss *Garmon* or come to grips with its logic. Their attempts to avoid it misread their

cases. *English* did not require a "direct and substantial effect" on a federally-regulated matter before a tort claim was preempted, as petitioners claim. Pet. 6. In *English*, the federal law preempted the field as to state law motivated by nuclear safety concerns, but saved state laws with "purposes other than protection against radiation hazards." 496 U.S. at 82, 84 (quoting 42 U.S.C. § 2021(k) (1982)) (emphasis omitted). This Court held that a state law was preempted if *either* (a) it had a safety purpose *or* (b) even if not motivated by safety, it had a "direct and substantial effect" on safety decisions. 496 U.S. at 84-85. This analysis applied not just to tort law but to state statutes including "state minimum wage and child labor laws." 496 U.S. at 85.

Thus, the "direct and substantial effect" language petitioners cite did not un-preempt state law within the field Congress set out to occupy – it *preempted* state law outside that field. It set up no special rule for tort claims. And it interpreted a different statute not here at issue. Ultimately it is beside the point. *Napier* defines the field Congress occupied in LIA, it holds that LIA preempts all state law, regardless of effect on federal regulations even whether there are federal regulations, and Congress deliberately reaffirmed it. Pp. 7-11 above.

In any event, the supposed *English* rule is easily satisfied here. "[S]tate-law claims would have a direct and substantial effect on the uniformity of locomotive design, construction, and material mandated by Congress through the BIA." *Scheiding*, 993 P.2d at 1002. If each state adopted different liability-triggering standards, locomotives would have to change equipment at the border or carry equipment required by the most stringent state's law. "Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Law*, 114 F.3d at 911.

Petitioners get no further in arguing that only "conflict[ing]" tort claims are preempted under *Silkwood*, 464 U.S. 238. Pet. 7. In *Silkwood*, federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing tort law remedies." 464 U.S. at 251-52. The legislative history showed that Congress assumed and intended common-law remedies to remain available. 464 U.S. at 251, 253-54, 256. Hence, as this Court has said, "our decision [in *Silkwood*] *turned on specific statutory evidence*" that Congress had intended to preserve state common law claims. *Buckman*, 531 U.S. at 352 (quoting *Silkwood*, 464 U.S. at 257) (emphasis added).

That is not the case under LIA, as the lower courts agree. Nothing in *Silkwood* allows state tort law to intrude when the statute "contains no evidence Congress assumed or intended state remedies for design defects would be preserved." *Scheiding*, 993 P.2d at 1001 (quotations omitted); *Kilgore*, 853 So. 2d at 178. There is no such evidence here. Instead, Congress created a different compensation scheme, FELA, that does not undermine uniformity. *See Law*, 114 F.3d at 912; pp. 10-11 above. And, unlike *Silkwood*, LIA's field must include tort law to achieve Congress' purpose in preempting. LIA could not remove "the design, the construction, and the material of every part of the locomotive" from state regulation, *Napier*, 272 U.S. at 611, and so provide uniform national regulation, if juries in each state imposed liability in respect to the design, construction or materials of those parts, based on 50 states' different laws. *Scheiding*, 993 P.2d at 1001; *Kilgore*, 853 So. 2d at 178. That patchwork is exactly what LIA and *Napier* are meant to foreclose. *Law*, 114 F.3d at 910-11; *Scheiding*, 993 P.2d at 1001-02. *Silkwood*, in fact, confirms the normal rule: when Congress occupies a field, "any state law" in the field is preempted. 464 U.S. at 248.

Thus, none of the cases petitioners cite is on point, much less creates a conflict with current law, let alone support the holes petitioners try to poke in LIA's pre-empted field.

### C. The Lower Courts Agree That LIA Pre-empts Claims Against Manufacturers.

Petitioners argue that their claims, although within the preempted field, are saved because brought against a manufacturer who made the locomotive rather than the operator who ran it. Pet. 8-16. No appellate court has ever permitted avoidance of field preemption on that ground.

To the contrary, every federal circuit or state court of last resort to consider the argument rejects it, and holds that LIA preempts state law directed at locomotive manufacturers when it seeks to regulate matters within the occupied field. *Oglesby,* 180 F.3d at 462 (defect and failure to warn claim against manufacturer preempted); *Springston,* 130 F.3d at 244-45 (defect claim against manufacturer preempted); *Law,* 114 F.3d at 911-12; *Forrester,* 255 F.3d at 1210 (claim against locomotive crane manufacturer preempted); *First Security,* 152 F.2d at 880-81 (quoting *Law*); *Darby,* 811 N.E.2d at 1125-26 (asbestos claim against locomotive manufacturer preempted; that plaintiff sued manufacturer was "not legally significant"); *Scheiding,* 993 P.2d at 999, 1003-04 (same); *Kilgore,* 853 So. 2d at 175-76 (same).

Those uniform rulings are right, indeed inevitable. LIA by its terms applies to manufacturers, contrary to petitioners' claim. Pet. 12. LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994, 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49 U.S.C. § 21302).[11] The 1994 recodification act

[11] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made

(Continued on following page)

omitted that as "surplus" (*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make clear that Congress intended no substantive change. Agency regulations reflect LIA's application to manufacturers; they penalize any "manufacturer ... of railroad equipment ... who violates any requirement of ... the Locomotive Inspection Act" or locomotive safety regulations under it – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b).

Additionally, the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier,* 272 U.S. at 611. Manufacturers are at the center of that field; they design and construct locomotives. *See Oglesby,* 180 F.3d at 462 (LIA preempts claims against manufacturers; "the design and construction of a part are in the hands of a manufacturer.") If states could set standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts that complied with those state standards. Railroads would have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly the state regulation of locomotives that LIA and *Napier* forbid.

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform,

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"explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. *See also* n.12.

> federal railroad regulations would be undermined. . . .

*See Law*, 114 F.3d at 910-13; *Darby*, 811 N.E.2d at 1125-26 (quoting *Law*); *Scheiding*, 993 P.2d at 1003-04 (quoting *Law*); *Kilgore*, 853 So. 2d at 175 (quoting *Law*).

Moreover, field preemption turns on whether the subject of the claim is within the preempted field – not "on whom the legal duty is imposed." *See Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is asbestos parts of motors, brake shoes, steam generators and so forth. P. 2 above. That subject is squarely within the preempted field, and so preempted.

Petitioners' contrary argument rests on one district court decision, *Lorincie v. SEPTA*, 34 F. Supp. 2d 929 (E.D. Pa. 1998). This Court does not ordinarily review claimed conflicts with district court decisions. Sup. Ct. R. 10. And *Lorincie* is a minority of one, for good reason. It relied on a supposed presumption against preemption. 34 F. Supp. 2d at 934. But "[a]n 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (involving ship design). Thus no such presumption applies here; railroads have been "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687-88 (1982). *Lorincie* also wrongly assumed that LIA does not apply to manufacturers, 34 F. Supp. 2d at 934, but LIA does. Pp. 23-24 above. In addition, *Lorincie* rested on two lower court cases that have since been overturned.[12] No surprise, *Lorincie* has

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[12] *See Lorincie*, 34 F. Supp. 2d at 933 n.3, 934 n.6 (citing *Viad Corp. v. Superior Court*, 55 Cal. App. 4th 330 (1997) and district court decision in *Oglesby v. Delaware & Hudson Ry.*, 964 F. Supp. 57 (N.D.N.Y. 1997)); *Scheiding*, 993 P.2d at 1004 n.6 (overruling *Viad*); *Oglesby*, 180 F.3d 458 (reversing district court decision in *Oglesby*).

been rejected on this point by every court to address it. *See Oglesby,* 180 F.3d at 462; *Kilgore,* 853 So. 2d at 176-77; *Roth v. I & M Rail Link, LLC,* 179 F. Supp. 2d 1054, 1061 (S.D. Iowa 2001).

Ultimately petitioners admit that LIA must preempt claims against manufacturers. Pet. 14. They argue that conflict preemption principles should govern, but cite no authority. There is none; because LIA occupies the field, whether the proposed state law conflicts with a federal law is "without legal significance." *Napier,* 272 U.S. at 613. Every circuit or state court of last resort to address the question agrees that LIA preempts claims against manufacturers. There is, again, nothing to review.

### D. State Law Cannot Regulate Locomotive Design Whether Or Not The Locomotive Is In Use.

Petitioners next advise that LIA "only applies when a railcar or locomotive is in 'use or allowed to be used,'" so preemption applies only when the locomotive is in "use or allowed to be used," and try to interest the Court in a supposed debate over the meaning of "in use." Pet. 16-18. There is, again, nothing to review Petitioners do not cite any lower-court case holding that LIA preemption turns on whether the locomotive was in use at the time. None does, for very good reasons.

First, petitioners' argument is impossible. Petitioners argue that states should be able to regulate a locomotive's design, construction, parts or materials when the locomotive is being repaired off line, while the FRA exclusively regulates the design when it's in operation on line. That is nonsense. A locomotive's design, parts, construction and materials are the same on line or off. Indeed, the off-line roundhouse's job is to put the locomotive and its on-line parts in condition to operate on line. Thus, *Seaman*, 707 N.Y.S.2d at 302, soundly rejected petitioners' notion,

explaining it is "irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use." 707 N.Y.S.2d at 302.

Second, the federal field is defined not by *where* the regulation is applied but by the physical "object" that is regulated. *Napier,* 272 U.S. at 611-13. The physical object of petitioners' proposed state regulation is the locomotive and the design, construction, and material of its parts. Therefore, the regulation is preempted. *Id.*

Third, contrary to petitioners' theory, Pet. 16, LIA continues to apply when the locomotive is off-line. LIA regulates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. Regulations under LIA require daily inspections (49 C.F.R. § 229.21); inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49 C.F.R. §§ 229.23-25 and Form FRA F180-49A); and further tests annually and biennially. (49 C.F.R. §§ 229.27-31); *see also Lilly v. Grand W. Trunk R.R.,* 317 U.S. 481, 486-87 (1943) (approving rules under LIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month and cab aprons to be "maintained in a safe and suitable condition"). These LIA-regulated activities occur off-line. Indeed, LIA commands that a locomotive not inspected, tested and repaired while off-line can't be used at all on line. 49 U.S.C. § 20701(2).

Fourth, petitioners' express textual argument is misplaced. Implied field occupation results not from the statute's text but from the dominance of the federal interest and the statute's purpose, structure, and pervasiveness. *See Pennsylvania v. Nelson,* 350 U.S. 497, 502-504 (1956). Thus, LIA's occupation of the field – and the scope of the field – is discerned not from the text but from

the "broad scope of the authority conferred upon the [FRA]." *Napier,* 272 U.S. at 611, 613; *Law,* 114 F.3d at 910-12; *Oglesby,* 180 F.3d at 462. State-law requirements, on- or off-line, would infringe that authority and disrupt uniformity and the federal regime, and so are preempted.

Particularly here. Any regulation of locomotive parts necessarily applies to the manufacturer upon delivery of the locomotive; "once they sell the train, it's out of their hands." *Law,* 114 F.3d at 912 n.3. State regulation of locomotive parts, whether applicable on line or off, would therefore require the manufacturer to deliver–and accordingly the railroad to buy – a locomotive meeting the state regulation. That is exactly what preemption of state law forbids. *Cf. Law,* 114 F.3d at 910-11; pp. 9-10 above.

Petitioners' cases (Pet. 16-18) say nothing different. None has anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads alleging that the railroad failed to discharge its absolute LIA duty to maintain locomotives and parts by, for example, permitting ice or grease buildup on a locomotive while it is off line. They simply hold that the railroad's absolute duty to maintain applies to the locomotive's operation on line, but not when it is in repair or at rest off line, because a locomotive while off line (perhaps for months) needn't be in condition to operate on line. *E.g., Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *Deans v. CSX Transp., Inc.*, 152 F.3d 326 (4th Cir. 1998); *Pickham v. Maine Cent. R.R. Co.*, 887 F.2d 875, 882 (1st Cir. 1989); *Steer v. Burlington N., Inc.*, 720 F.2d 975 (8th Cir. 1983); *Estes v. S. Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979); *see also Phillips v. CSX Transp.*, 190 F.3d 285 (4th Cir. 1999) (SAA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (SAA). Others similarly hold that experimental or detached parts were not subject to LIA's absolute duty to maintain. *See Lunsford*, 297 U.S. 398; *Varney v. Norfolk and W. Ry. Co.*, 899 F. Supp. 280, 282 (S.D. W. Va. 1995).

The absolute duty to maintain has nothing whatever to do with preemption. LIA preempts state law where the absolute duty to maintain does not apply at all. *Marshall*, 720 F.2d at 1152 (railroad owes no duty to maintain experimental devices, but state regulation of them is preempted).

But this is much ado about nothing. No case endorses the nonsensical proposition that federal law exclusively regulates design on line but state law can regulate it off line, when the design is the same whether off or on line. That cannot work. To the contrary, *Napier* determined 75 years ago that LIA preempts the field of the design, construction and materials of every part of the locomotive. 272 U.S. at 611-13. Plaintiff's claims attack the design, construction and materials of locomotive parts, and so fall squarely within the preempted field.

### E. The Seventh Circuit's *Adkins* Decision Is Off Point.

Still trying to avoid the uniform case law preempting their claims, petitioners claim that the decision below conflicts with *Adkins v. Illinois Central R.R. Co.*, 326 F.3d 828 (7th Cir. 2003). Pet. 18-19. Not at all. *Adkins* concerned *complete* preemption, a jurisdictional doctrine off any point here. Complete preemption allows a case filed in state court to be removed to federal court. It happens only when a federal law *both* preempts the state-law claim *and* authorizes a cause of action arising under federal law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6-8 (2003); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983). *Adkins* held that LIA did not *completely* preempt a claim because LIA did not authorize a "federal forum." 326 F.3d at 835. *Adkins* emphasized that it merely decided the case was not removable and was not

answering whether preemption was a "defense." *Adkins*, 326 F.3d at 835. Every federal circuit or state supreme court holds that preemption is a defense to claims like petitioners'. Pp. 13-15 above.

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*Napier* has been the law for over 80 years. Petitioners cite no case from any court that questions *Napier*'s controlling force over claims like these, and no case that would allow their claims to proceed. Petitioners present no issue to review here.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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